Feb 22 2000 (8)

Supreme Court, U.S.
FILED
FEB 22 2000
CLERK

No. 99-7000

In The

Supreme Court of the United States

BOBBY LEE RAMDASS,

Petitioner,

v.

RONALD J. ANGELONE, Director,
Virginia Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONER

Of Counsel:

DAVID I. BRUCK
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

F. NASH BILISOLY
Counsel of Record
JOHN M. RYAN
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, VA 23510
(757) 446-8600

MICHELE J. BRACE
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
1001 East Main Street
Richmond, VA 23219
(804) 643-6845

Counsel for Petitioner

RECEIVED
MAR - 7 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

63pp

CAPITAL CASE
QUESTION PRESENTED

Simmons v. South Carolina holds that when a prosecutor seeks the death sentence on the ground of the defendant's future dangerousness, the defendant has a constitutional right to inform the jurors truthfully that if they spare his life, state law forbids him ever to be released from prison. Does the rule in *Simmons* turn on the actual operation of state law, or on its hypertechnical terms; and must a federal habeas court adjudicating a *Simmons* claim make its own analysis of the functional consequences of state law, or is it bound by the state courts' characterization of state law for federal constitutional purposes?

PARTIES TO THE PROCEEDINGS

All parties are named in the caption.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED 1

STATEMENT OF THE CASE 2

A. The Crimes and the Trials 2

B. Appeal, Certiorari, and Remand 9

C. Collateral Proceedings 12

SUMMARY OF THE ARGUMENT 19

ARGUMENT 23

A. The Lower Courts Engaged in the Wrong Analysis 25

1. Questions Concerning the Nature or Duration of Restraints on Liberty Require a Functional, Rather Than a Technical, Mode of Analysis 25

2. Federal Questions Require a Mode of Analysis That Looks to the Operating Consequences of Relevant State Law, Rather Than to the State's Characterization of That Law 28

TABLE OF CONTENTS – Continued

Page

3. However the Virginia Supreme Court May Characterize the Circumstances That Result in Parole "Ineligibility" Under State Law, Ramdass Was Certain Never To Have an Opportunity To Be Paroled and Was Entitled To So Inform the Jury Under *Simmons* 36

B. The *Simmons* Court Itself Looked at the Consequences of State Law Rather than the State's Characterization, and the Facts Demonstrating This Also Show That Ramdass's Case Is Indistinguishable from Simmons's Case on Both the Facts and the Law..... 39

1. The *Simmons* Facts and This Court's Analysis..... 40

2. Ramdass's Case Is Functionally Equivalent to Simmons's Case..... 43

3. The Rule in *Simmons* Would Apply to Ramdass Even If Jonathan Simmons Had Been Technically Ineligible for Parole 45

CONCLUSION 48

TABLE OF AUTHORITIES

Page

CASES

Bailey v. Alabama, 219 U.S. 219 (1911) 20, 28, 29

Bakery and Pastry Drivers and Helpers Local 802 v. Wohl, 315 U.S. 769 (1942).....19, 24, 28

Bowen v. Gilliard, 483 U.S. 587 (1987)..... 26

Carafas v. LaVallee, 391 U.S. 234 (1968) 27

Clark v. Commonwealth, 257 S.E.2d 784 (Va. 1979), *cert. denied*, 444 U.S. 1049 (1980) 6

Collins v. New Hampshire, 171 U.S. 30 (1898).....34, 35

Correll v. Thompson, 63 F.3d 1279 (4th Cir. 1995), *cert. denied*, 516 U.S. 1035 (1996) 12

Galveston, H. & S.A.R. Co. v. State of Texas, 210 U.S. 217 (1908)..... 33

Gardner v. Florida, 430 U.S. 349 (1977)..... 18

Hawks v. Cox, 175 S.E.2d 271 (Va. 1970) 12

Henderson v. Mayor of the City of New York, 92 U.S. (2 Otto) 259 (1875) 33, 34

Hicks v. Feiock, 485 U.S. 624 (1988).....30, 31

Hinton v. Commonwealth, 247 S.E.2d 704 (Va. 1978) 6

In re Winship, 397 U.S. 358 (1970)..... 30

Jones v. Cunningham, 371 U.S. 236 (1963) 26, 27

Lawrence v. State Tax Commission of Mississippi, 286 U.S. 276 (1932)..... 33

TABLE OF AUTHORITIES – Continued

Page

Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952) 20, 31, 32

Miranda v. Arizona, 384 U.S. 436 (1966) 26

Mullaney v. Wilbur, 421 U.S. 684 (1975) 29

Oregon v. Mathiason, 429 U.S. 492 (1977) 26

Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954) 32, 33

Ramdass v. Angelone, 187 F.3d 396 (4th Cir. 1999) 1, 15, 16, 17, 18

Ramdass v. Angelone, 28 F. Supp. 2d 343 (E.D. Va. 1998) 1, 13, 14

Ramdass v. Commonwealth, 450 S.E.2d 360 (Va. 1994) 1, 2, 11, 23, 37

Ramdass v. Commonwealth, 437 S.E.2d 566 (Va. 1993) 1, 9, 10

Ramdass v. Director, Virginia Dept. of Corrections, No. 951594 (Va. Mar. 18, 1996) 12

Ramdass v. Virginia, 512 U.S. 1217 (1994) 1, 10

Ramdass v. Virginia, 514 U.S. 1085 (1995) 12

Schollenberger v. Pennsylvania, 171 U.S. 1 (1898) 35

Simmons v. South Carolina, 512 U.S. 154 (1994) ... *passim*

Skipper v. South Carolina, 476 U.S. 1 (1986) 18

Smith v. Commonwealth, 113 S.E. 707 (Va. 1922) 11

St. Louis S.W.R. Co. v. Arkansas, 235 U.S. 350 (1914) 30

Stansbury v. California, 511 U.S. 318 (1994) 26

TABLE OF AUTHORITIES – Continued

Page

State v. McKay, 386 S.E.2d 623 (S.C. 1991) 40, 41

State v. Torrence, 406 S.E.2d 315 (S.C. 1991) 40

Teague v. Lane, 489 U.S. 288 (1989) 16, 18

Thornhill v. Alabama, 310 U.S. 88 (1940) 24

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d)(1) 16, 48

28 U.S.C. § 2254(d)(2) 13

South Carolina Code § 24-21-640 ..... 41, 42

South Carolina Rule of Criminal Procedure 29(b) 43

Virginia Code § 19.2-264.4 ..... 3, 8, 9

Virginia Code § 19.2-264.5 8

Virginia Code § 53.1-151 ..... 2, 8, 10, 14, 25

Virginia Supreme Court Rule 3A:15 ..... 17, 18, 37, 38

CONSTITUTION

U.S. Const., amend. XIV 1, 2, 12, 23, 24

MISCELLANEOUS

Joint Appendix in *Simmons v. South Carolina*, No. 92-9059, 1993 WL 669003 41

TABLE OF AUTHORITIES – Continued

Page

Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605 (1989) 9

Petitioner's Reply Brief in *Simmons v. South Carolina*, No. 92-9059, 1993 WL 625970 (filed Dec. 27, 1993) 41

Respondent's Brief in *Simmons v. South Carolina*, No. 92-9059, 1993 WL 669003 (filed Dec. 14, 1993) 21, 40

Transcript of Oral Argument in *Simmons v. South Carolina*, No. 92-9059, 1994 WL 663636 (Jan. 18, 1994) 43

OPINIONS BELOW

The opinion of the court of appeals (J.A. 380-421) is reported at *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir. 1999). The opinion of the district court (J.A. 307-379) is reported at *Ramdass v. Angelone*, 28 F. Supp. 2d 343 (E.D. Va. 1998). The opinion of the Virginia Supreme Court on direct review following remand from this court (J.A. 128-131), is reported at *Ramdass v. Commonwealth*, 450 S.E.2d 360 (Va. 1994). This Court's order granting certiorari, vacating the state court's initial judgment and remanding for reconsideration (J.A. 121) in light of *Simmons v. South Carolina* is reported at *Ramdass v. Virginia*, 512 U.S. 1217 (1994). The initial opinion of the Virginia Supreme Court on direct review (J.A. 102-120) is reported at *Ramdass v. Commonwealth*, 437 S.E.2d 566 (Va. 1993).

JURISDICTION

The court of appeals issued its opinion on August 3, 1999. Ramdass filed a timely petition for rehearing, which the court of appeals denied on September 17, 1999. A petition for certiorari was filed on November 12, 1999, and granted on January 7, 2000. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const., amend. XIV, § 1.)

This case also involves Virginia Code § 53.1-151 (Eligibility for Parole) and Virginia Supreme Court Rule 3A:15 (Motion To Strike or To Set Aside Verdict). The statute is reproduced in the appendix to this brief beginning at page App. 1 and the rule is reproduced at page App. 5.

STATEMENT OF THE CASE

A. The Crimes and the Trials

In the summer of 1992, just after being released on parole from a Virginia prison, petitioner Bobby Ramdass committed a series of violent robberies. These included the armed robbery of two customers at a Pizza Hut in Fairfax County, Virginia, on August 25, 1992; an armed robbery at a Domino's Pizza in Alexandria, Virginia, on August 30, 1992; and an armed robbery at a 7-Eleven in Fairfax County on September 2, 1992, during which a store clerk, Mohammed Kayani, was shot and killed. At the time of these offenses, Ramdass was 20 years old.

Ramdass was quickly apprehended, and a series of separate criminal proceedings followed. First, a Fairfax County jury found Ramdass guilty of the Pizza Hut robberies on December 15, 1992, and fixed his aggregate sentence at imprisonment for 76 years. *Ramdass v. Angelone*, 450 S.E.2d 360, 361 (Va. 1994) (J.A. 130, 281, 355,

385). The court entered judgment and imposed the jury's recommended sentence on January 22, 1993. *Id.* (J.A. 130).

Meanwhile, on January 7, 1993, an Alexandria jury convicted Ramdass of the Domino's Pizza robbery and fixed his sentence at 18 years imprisonment. *Id.* (J.A. 130, 281). The court subsequently entered judgment and imposed the jury's recommended sentence on February 18, 1993. *Id.* (J.A. 130, 281).

Three weeks after the Domino's Pizza guilty verdict, on January 28, 1993, a third state court jury, sitting in Fairfax County, found Ramdass guilty of capital murder for the death of the 7-Eleven employee, Mr. Kayani. (J.A. 4). The court conducted a capital sentencing trial before the jury the next day, January 29, 1993. (J.A. 7). At that proceeding, the prosecution's case for the death penalty rested exclusively on the statutory aggravating factor that Ramdass "would commit criminal acts of violence [in the future] that would constitute a continuing serious threat to society." Virginia Code § 19.2-264.4(C).

In support of this future-dangerousness aggravating factor, the prosecutor relied on the juries' previous verdicts in the Pizza Hut robbery (J.A. 9, 16-18, 53-55, 81), and the Domino's Pizza robbery (J.A. 57-59, 81). The prosecutor also brought to the jury's attention Ramdass's involvement in several as-yet-unadjudicated offenses: a robbery of a hotel clerk (J.A. 9-10, 18-23, 55-56, 81), a robbery and shooting of a taxi driver (J.A. 23-46), and the shooting of a drug dealer (J.A. 62-64). In addition, the prosecutor presented records of Ramdass's juvenile conviction for purse snatching (J.A. 15, 80) and an unarmed robbery that occurred in 1988, for which Ramdass was

tried as an adult and sentenced to seven years imprisonment. (J.A. 9, 12-14, 81).

The prosecutor emphasized the issue of parole during the sentencing trial. He elicited testimony showing that Ramdass had been released on parole in 1992, very shortly before the commission of the instant crimes, after serving only four years of the seven-year sentence for unarmed robbery. (J.A. 46-47, 61-62). In eliciting this fact, the prosecutor was careful to distinguish between "mandatory" and "discretionary" parole, and he established that Ramdass's parole release had been mandatory. (J.A. 46-47, 51-52, 61-62). Later, during his cross-examination of Ramdass, the prosecutor established that Ramdass had also been released on parole from a state juvenile institution (J.A. 60-62), that he was returned to the institution after violating that parole, and that despite his parole violation, he was nevertheless released again on a 30-day furlough from which he never returned. (J.A. 60-61). The prosecutor used his cross-examination of Ramdass to remind the jury that state prison authorities had "mandatorily released [Ramdass] on parole in May of '92" after he had served less than four years of a seven-year adult prison sentence. (J.A. 62). He returned to this subject in closing argument, stating:

> Finally in May of 1992, he's back on the streets of Fairfax County. When he finally got paroled in May of 1992, it's significant to note that this parole is for a robbery. The first time he was tried as an adult, he was tried for robbery in 1988. He serves a little over four years total for that robbery, in May he's released.

(J.A. 81). After again enumerating Ramdass's adjudicated and unadjudicated crimes, the prosecutor concluded:

> We submit to you members of the Jury, he is the epitome of dangerousness. He is a proven serious threat to society. The best indicator of future behavior is past behavior and he does it in spades.

(J.A. 82).

In an effort to rebut the future dangerousness aggravating factor and persuade the jury to vote for life imprisonment, defense counsel tallied the term-of-years sentences for Ramdass's adjudicated offenses and argued that, if these sentences were tacked together, they would total at least 99 years. (J.A. 49, 85). In his opening statement at the penalty phase, defense counsel squarely conceded that Ramdass "should be locked up for the rest of his life" (J.A. 51), and in closing argument he went even further:

> If you believe that Bobbie Lee's a wild, crazed animal, then society must do something. I agree with you, they must. We must.
>
> But I submit a wild animal removed from its environment is not merely destroyed. We cage it. We put it away for life and that is what you should do.
>
> * * * *
>
> How much does society need to exact? I agree he should be put away for [his crimes]. He should never see the light of day. But to take another human life, that's not right.

(J.A. 84-85). The core of defense counsel's argument on future dangerousness was that his client would not – and *should* not – ever "see the light of day." (J.A. 85). Counsel was barred by Virginia law, however, from saying anything about whether Ramdass's present or future terms of imprisonment might be cut short by release on parole, as the jury knew his prior juvenile and adult prison sentences had been. (J.A. 89-90). *See, e.g., Clark v. Commonwealth*, 257 S.E.2d 784, 792 (Va. 1979) (jury may not be informed of defendant's parole eligibility or ineligibility), *cert. denied*, 444 U.S. 1049 (1980); *Hinton v. Commonwealth*, 247 S.E.2d 704, 706 (Va. 1978) (same).

In addition to arguing that society could adequately protect itself from Ramdass by imprisoning him for life, defense counsel presented mitigating evidence about Ramdass's deprived background. (J.A. 48-50). This evidence showed that Ramdass was the first child of an interracial marriage between a former topless dancer and a U.S. Army soldier of Pakistani origin. (J.A. 67-68). Ramdass's mother, Peggy Ramdass, was one of 21 children, and her own childhood had been marked by neglect, abuse, and incest. (J.A. 65-66, 186-187). Her parents and siblings, who were white, referred to Peggy and her dark-skinned sons as "nigger lovers," and refused to help them even when they became homeless and desperately poor. (J.A. 69). For his part, Ramdass's father consistently denied that Ramdass was actually his child: he beat Ramdass constantly, but spared Ramdass's younger brother Mark, whom he acknowledged as his son. (J.A. 68). Ramdass's father deserted his family when the children were

very young, and at the time of a 1988 presentence investigation, conducted when Ramdass was 17, the elder Ramdass was reportedly AWOL from the Army, and his whereabouts were unknown. (J.A. 51-51a).

After her husband's disappearance, Peggy Ramdass and her sons moved from place to place, and for a time were forced to live in the furniture storage bin of an apartment complex. (J.A. 69). When the boys were about six and seven years old, she taught them to steal food from grocery stores in order to eat, and to beg for money by pretending that they were soliciting for charity. (J.A. 69-70). She lost custody of her children twice. (J.A. 74-75). When the boys were about eight and nine years old, she began to live with a boyfriend identified as Sanchez. (J.A. 75). Sanchez abused both Peggy and the children, locking Ramdass in the closet and beating him with a belt buckle. (J.A. 75-76). At one point, Sanchez held Mark Ramdass out of a fifteenth floor window by his legs and threatened to drop him. (J.A. 76).

After the close of the evidence, the trial court instructed the jury that it could fix Ramdass's punishment at death only if it found "unanimously and beyond a reasonable doubt that there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing, serious threat to society." (J.A. 76a). The court also instructed the jury that it was permitted to fix Ramdass's sentence at life imprisonment, even if it found the future dangerousness aggravating factor. After deliberating for nearly three hours, the jury sent out the following question to the court:

> If the Defendant is given life, is there a possibility of parole at some time before his natural death?

(J.A. 88). Over defense counsel's objection, the court gave the response then required by Virginia law:

> If you find the Defendant guilty, which you have in this case, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

(J.A. 91). The jurors deliberated for another hour and a half and then fixed Ramdass's sentence at death.

Before the court entered judgment on April 2, 1993, it conducted a sentencing hearing and heard additional argument from counsel.[1] Defense counsel asserted that under the "three strikes" provision of Virginia Code § 53.1-151(B1), Ramdass was, and at the time of trial had been, ineligible for parole. (J.A. 93-94). Defense counsel then reported that he had attempted to contact members of the sentencing jury to determine whether information about the possibility of parole would have affected their verdict. He reported that he was able to reach six jurors, and three of them (two men and one woman) were willing to speak. (J.A. 94-95). Counsel reported that each of these jurors said they personally would have voted for

[1] If the jury fixes the sentence at death, the trial court may nonetheless impose a life sentence after conducting the sentencing hearing. Virginia Code § 19.2-264.5. If the jury fixes the sentence at life, the trial court must impose a life sentence. Virginia Code § 19.2-264.4(A).

life imprisonment rather than death if they had known that Ramdass had no possibility of being released from prison.[2] (J.A. 95). Two jurors expressed the opinion that the jury as a whole would have voted for life imprisonment had its members known that Ramdass could not be released on parole. (J.A. 95). Counsel represented that because of the court's answer to the jury's question during deliberations, the jurors "all had a perception that [Ramdass] would be paroled" after approximately 20 years. (J.A. 95). Finally, counsel pointed to a study showing that the average Virginia juror believes a person sentenced to life imprisonment will serve only seven to ten years before being released on parole.[3] (J.A. 95). The state interposed no objection to counsel's report concerning the jurors' post-trial comments. After receiving this information, the trial court entered judgment and imposed the death sentence recommended by the jury. (J.A. 100-101).

B. Appeal, Certiorari, and Remand

On direct appeal, the Virginia Supreme Court affirmed the conviction and death sentence. *Ramdass v. Commonwealth*, 437 S.E.2d 566 (Va. 1993) (J.A. 102-120). In response to Ramdass's argument that his parole ineligibility should have been disclosed to the jury in answer

[2] If even one juror declines to fix the sentence at death, the court is required as a matter of law to impose a life sentence. Virginia Code § 19.2-264.4(E).

[3] *See* Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605 (1989), *also cited in Simmons v. South Carolina*, 512 U.S. 154, 170, n.9 (1994).

to its question about parole, the court said, "We repeatedly have held that a jury should not hear evidence of parole eligibility *or ineligibility* because it is not a relevant consideration in fixing the appropriate sentence." *Id.* at 573 (J.A. 117) (emphasis added). Shortly thereafter, this Court decided *Simmons v. South Carolina*, 512 U.S. 154 (1994), and remanded Ramdass's case for reconsideration in light of that case. *Ramdass v. Virginia*, 512 U.S. 1217 (1994) (J.A. 121).

On remand, Ramdass contended that *Simmons* had conclusively established that the trial court's refusal to answer his jury's inquiry about parole eligibility was federal constitutional error. (J.A. 123-127). Ramdass pointed out that he was not eligible for parole under Virginia's "three strikes" law, which provided in relevant part that:

> [a]ny person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

Virginia Code § 53.1-151(B1) (App. 1-4). Ramdass identified his three qualifying convictions as the Pizza Hut armed robberies, the Domino's Pizza armed robbery, and the capital murder during the 7-Eleven robbery. (J.A. 123-124).

The Virginia Supreme Court set out its understanding of the federal constitutional right at issue in the following preliminary paragraph:

> In *Simmons*, the Supreme Court held that when "future dangerousness" is an issue in the sentencing phase of a capital murder case, the jury is entitled to information concerning the defendant's parole *ineligibility*. *Simmons*, 512 U.S. at ___, 114 S. Ct. at 2198. Hence, *Simmons* applies only if Ramdass was ineligible for parole when the jury was considering his sentence.

Ramdass v. Commonwealth, 450 S.E.2d 360, 361 (Va. 1994) (J.A. 129-130) (emphasis in original). The court then undertook to determine whether Ramdass was technically ineligible for parole on the date of his capital sentencing trial. It acknowledged that the Pizza Hut robberies counted as Ramdass's first "strike" under the statute, and it held that the jury's verdict that Ramdass was guilty of capital murder counted as the second "strike." *Id.* (J.A. 130). The court refused, however, to count the jury's guilty verdict in the Domino's Pizza robbery as the third "strike." Noting that Virginia's three-strikes statute requires three "convictions," the court held that a jury verdict of guilty does not become a "conviction" until judgment is entered. *Id.* (J.A. 130-131) (citing *Smith v. Commonwealth*, 113 S.E. 707, 709 (Va. 1922) (interpreting word "conviction" as requiring entry of judgment for purpose of determining whether candidate was disqualified from holding public office)). The court concluded that because the Domino's Pizza verdict was not reduced to judgment until 19 days *after* the capital sentencing trial, Ramdass was technically still eligible for parole under state law on the day that the jury considered his sentence for capital murder. *Ramdass v. Commonwealth*, 450 S.E.2d at 361 (J.A. 131). Treating this analysis of the

word "conviction" as dispositive of Ramdass's constitutional rights under *Simmons*, the Virginia Supreme Court again affirmed his death sentence. *Id.* (J.A. 131). This Court denied Ramdass's ensuing petition for certiorari. *Ramdass v. Virginia*, 514 U.S. 1085 (1995).

C. Collateral Proceedings

Ramdass next filed a habeas corpus petition in the Virginia Supreme Court, alleging that his rights under the Fourteenth Amendment were violated by the trial court's refusal to inform the jury of his ineligibility for parole. (J.A. 145-149). The Virginia Supreme Court summarily dismissed the claim on the ground that it had already been addressed on the merits on direct appeal and would not be reconsidered on collateral review.[4] *Ramdass v. Director, Virginia Dept. of Corrections*, No. 951594 (Va. Mar. 18, 1996). (J.A. 151).

Ramdass then filed a federal habeas corpus petition. As his first claim, Ramdass alleged that the trial court violated his rights under the Fourteenth Amendment when it refused to provide the jurors with the truthful information that, if they sentenced Ramdass to life imprisonment, there existed no possibility of his being released on parole. (J.A. 152-183).

---

[4] The Virginia Supreme Court cited the rule in *Hawks v. Cox*, 175 S.E.2d 271 (Va. 1970), as the basis for its dismissal of Ramdass's claim. *Hawks* states that claims will not be considered in collateral proceedings if they were addressed on the merits in prior proceedings. Any claim dismissed under the rule in *Hawks* is deemed to be fully preserved for federal review on the merits. *See Correll v. Thompson*, 63 F.3d 1279, 1289 n.8 (4th Cir. 1995), *cert. denied*, 516 U.S. 1035 (1996).

After considering the parties' pleadings, a federal magistrate judge recommended that habeas relief be granted on this issue because the state court's decision on the federal constitutional question was "contrary to clearly established Federal law, as determined by the Supreme Court of the United States." (J.A. 298). The magistrate judge noted "that the question asked by the jury was not couched in terms of actual parole eligibility, but instead, whether there was 'a possibility of parole at some time before his natural death.' " (J.A. 303). He concluded, "[t]his Court does not believe that *Simmons* was limited to the very narrow issue of specific parole eligibility or lack thereof. . . . The Virginia Supreme Court's response, on remand, imposes limits on the application of *Simmons* not fairly contemplated by the language in the opinion." (J.A. 304).

Following *de novo* review, the federal district court agreed with the magistrate judge and granted the writ. *Ramdass v. Angelone*, 28 F. Supp. 2d 343 (E.D. Va. 1998) (J.A. 307). The district court gave two reasons. First, the Virginia Supreme Court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2):

> An obvious question arises from the [state] court's reasoning: If the Domino's Pizza conviction did not constitute a conviction for purposes of ineligibility for parole (because the court had not yet imposed a sentence), how then could Petitioner's immediate offenses for which the jury was determining the sentence (and therefore judgment had not been entered on the

> verdict) constitute a second predicate conviction? . . . From the record of the state court proceedings, the Court finds that the procedural posture of the Domino's Pizza conviction is factually indistinguishable from the procedural posture of the immediate offense. Accordingly, the Court finds that in light of the record before it, the Virginia Supreme Court made an unreasonable determination of the facts when applying the law to determine whether Petitioner was parole eligible.

Ramdass v. Angelone, 28 F. Supp. 2d at 365 (J.A. 357).

Second, even if the state court's decision was not based on an unreasonable determination of the facts, "by concluding that petitioner was parole eligible based on the lack of the ministerial act of a trial court entering judgment, the Virginia Supreme Court evaded the full import of *Simmons*." *Id.* at 367 (J.A. 362). The state court's decision thus "involved an 'unreasonable application' of *Simmons* as determined by the Supreme Court of the United States." *Id.* at 368 (J.A. 363). The district court further noted:

> [E]veryone [except the jury] was aware that, at the time of the capital sentencing phase, petitioner had either plead[ed] guilty or been found guilty by a jury of at least three qualifying felony offenses under Virginia Code Section 53.1-151(B). Indeed, these offenses were relied upon to establish petitioner's future dangerousness. The jury could have been informed, with all confidence, that petitioner would never be released from prison, thereby rebutting the notion that he presented a future danger to society.

Id. at 367 (J.A. 362).

A divided panel of the Fourth Circuit reversed. *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir. 1999) (J.A. 380). The majority quickly rejected the district court's conclusion that the state court's decision was based on an unreasonable determination of the facts:

> As an initial matter, we clarify that the parole eligibility determination is a question of law, not fact, as the Virginia Supreme Court has recognized. . . . Accordingly, to the extent that the district court's decision to grant the writ rested on the unreasonable-determination-of-fact rationale, it cannot stand.

Id. at 407 (J.A. 400) (citations omitted).

The majority then rejected Ramdass's contention that he was *functionally* ineligible for parole, and held that *Simmons* applies only in the narrow circumstance where a defendant is *technically* and *legally* ineligible for parole on the date of the capital sentencing proceeding. The majority essentially advanced three reasons. First, it announced that *Simmons* turns solely on the state court's determination of state law, and that this determination is dispositive:

> [T]he fact that a defendant will have no possibility of parole if given a life sentence can only stem from the legal conclusion that state law bars eligibility for parole. Because parole eligibility is entirely a creature of state law, Ramdass' conception of practical or functional parole eligibility must inevitably collapse into a determination of state law.

Id. at 406 (J.A. 399) (emphasis omitted).

Second, the majority said that conditioning the application of *Simmons* on a pragmatic determination that the defendant will never be eligible for release on parole "is simply incompatible with the logic of *Simmons* itself." *Id.* at 405 (J.A. 397). According to the majority, this logic is discernible from the phrasing of such statements in *Simmons* as " 'We hold that where the defendant's future dangerousness is at issue, and *state law* prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.' " *Id.* at 405 (J.A. 397) (quoting *Simmons* plurality opinion, 512 U.S. at 156) (Fourth Circuit's emphasis).

Third, the Fourth Circuit majority held in the alternative that relief could not be granted under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). "Even were we persuaded by Ramdass' theory that practical rather than legal parole ineligibility suffices to trigger *Simmons*, we would conclude that was not 'clearly established' as required by 28 U.S.C. § 2254(d)(1)," as enacted by AEDPA. *Ramdass v. Angelone*, 187 F.3d at 406 (J.A. 399). After discussing the similarities between § 2254(d)(1) and the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), the majority added that Ramdass's claim would fail "either under *Teague* or under § 2254(d)(1)." *Ramdass v. Angelone*, 187 F.3d at 406-07 (J.A. 400).

Circuit Court Judge Murnaghan dissented on each point. First, he emphasized that "the scope and parameter of the *Simmons* right is a matter of federal constitutional law." *Id.* at 413 (J.A. 417). "Admittedly, the [due process] right recognized in *Simmons* . . . only applies to those for

whom state law has eliminated the possibility of parole. But, the right is a federal right." *Id.* (J.A. 416). He explained that federal due process was denied because Ramdass was ineligible for parole consideration absent some hypothetical future development of the sort that *Simmons* specifically disregarded:

> [A]t the time of the . . . [7-Eleven] sentencing, only some hypothetical future development as remote as legislative reform, commutation, or clemency, could have affected entry of the Domino's Pizza robbery conviction and therefore prevented Ramdass from being parole ineligible. . . . Formal entry of the conviction at that point was merely a ministerial act. Thus, for all realistic intents and purposes, it was a guarantee that Ramdass would be parole ineligible [under state law] when the . . . [7-Eleven] conviction was formally entered.

Id. at 415 (J.A. 419-420).[5]

---

[5] Entry of judgment clearly was a ministerial act under state law in the circumstances of this case. At the time of the penalty phase in Ramdass's capital murder trial, the judge presiding over the Domino's Pizza matter already had denied Ramdass's motion to strike the evidence as insufficient to sustain the robbery conviction, and that motion could not be renewed. Virginia Supreme Court Rule 3A:15(a) (App. 5). There was a hypothetical possibility that the judge presiding over the Domino's Pizza matter could, in the future, set aside the robbery verdict in that case under Virginia Supreme Court Rule 3A:15(b) on the ground that the evidence was insufficient or that error was committed at trial, and thus eliminate the third "strike." There was, however, an identical hypothetical possibility that the judge presiding over the Pizza Hut matter could, in the future, set aside the robbery verdict in *that* case under Rule 3A:15(b), and thus eliminate the first "strike." In both robbery

Second, Judge Murnaghan declared that, far from being incompatible with the logic of *Simmons*, an assessment of the realistic possibility of parole that is based on the actual operation of state law is consistent both with "the genesis of *Simmons* . . . [as] merely an extension of the rule in *Gardner v. Florida*, 430 U.S. 349 . . . (1977), and *Skipper v. South Carolina*, 476 U.S. 1 . . . (1986)," and with the specific language in the *Simmons* opinions. *Ramdass v. Angelone*, 187 F.3d at 414 (J.A. 417). He concluded that under *Simmons*,

> regardless of the technical, legalistic definition of "conviction" used by the Virginia Supreme Court, Ramdass had a constitutional due process right to inform the jury of the wholly accurate information that by the time the sentence they were deliberating was officially entered by the judge, he would be ineligible under state law for parole.

Id. at 415 (J.A. 420-421).

Third, because the clearly established rule in *Simmons* fully covers Ramdass's circumstances, Judge Murnaghan recognized that neither the AEDPA or *Teague* presents any impediment to the grant of federal habeas corpus relief.

---

cases, the statutory 21-day window for setting aside a conviction under Rule 3A:15(b) was still open at the time of Ramdass's capital sentencing trial. The Virginia Supreme Court necessarily rejected any consideration of or reliance upon the hypothetical possibility of future release under Rule 3A:15(b) when it held that the Pizza Hut conviction counted in full as a "strike."

The Fourth Circuit denied Ramdass's petition for rehearing en banc on September 17, 1999, with four judges dissenting. (J.A. 429-430).

SUMMARY OF THE ARGUMENT

The Virginia Supreme Court's charge, on remand from this Court, was to determine whether Ramdass's rights under the Due Process Clause were infringed when he was not permitted to inform the jurors that if they sentenced him to life imprisonment, there was no possibility that he could be released on parole before his natural death. The federal question (was there a violation of due process) thus overlay a state-law question (was there a possibility of release on parole under state law).

The Virginia Supreme Court begged the federal question. Its adjudication was limited to an examination of state law and a determination that on the date of the capital sentencing trial, Ramdass was eligible for parole because he did not yet have three "convictions" as the state court defined that word. This analytical approach was flawed for the same reason that the state court's analysis was flawed in *Bakery and Pastry Drivers and Helpers Local 802 v. Wohl*, 315 U.S. 769 (1942). When a right arises under federal law and overlays state law, a reviewing court errs if it looks only at subsidiary technical definitions under state law and assumes that those definitions circumscribe the federal right. *Id.* at 774. Rather, when the federal question concerns the nature or duration of restraints on liberty, the Court has held that a

reviewing court should consider the functional realities of the situation rather than technical definitions.

This Court's precedents, going back more than a century, establish that when a federal question rests on top of a state-law question, the state court's characterization of its own law is not dispositive of the federal question. For purposes of deciding the federal question, the reviewing court must look to the actual consequences of state law. This rule holds true regardless of the nature of the case – civil, criminal, or collateral. *See, e.g., Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952) (state can determine operating incidence of its own tax, but for purposes of deciding whether that tax offends Commerce Clause, court must look to consequences of the tax); *Bailey v. Alabama*, 219 U.S. 219 (1911) (state can characterize criminal statute as one that merely punishes fraud, but for purposes of deciding whether statute violates Thirteenth Amendment by compelling involuntary servitude on pain of imprisonment, court must look to actual effect and operation of statute).

Under this well-established rule, Virginia can define the incidence of its parole law however it wishes, and Ramdass will have no federal basis for complaint. But it is equally plain that the federal due process issue in Ramdass's *Simmons* claim is governed by how Virginia's parole law actually operates, not by the label affixed by state law. The Virginia Supreme Court did not consider how state law actually operated, and the Fourth Circuit did not correct that error.

In Ramdass's case, state law *in actual operation* foreclosed any possibility that he could be released on parole

before his natural death. He had two of the three "strikes" required for parole ineligibility by state law, and entry of judgment for the third "strike" was a ministerial act whose performance was foreseeable, imminent, and inexorable.

The validity of Ramdass's claim under *Simmons* is proved by this Court's analysis in *Simmons* itself, which was based on the practical and foreseeable operation of South Carolina law rather than a technical determination of parole eligibility on a particular date. As the undisputed record clearly shows, Simmons was technically still eligible for parole at the time of his capital sentencing trial, and he could not be declared ineligible for parole until the parole board later determined whether his proffered "strikes" were for unrelated crimes. *See* Respondent's Brief in *Simmons v. South Carolina*, No. 92-9059, 1993 WL 669003, at 95-96 (filed Dec. 14, 1993). The Court was clearly cognizant of that fact. Based on the pragmatic and foreseeable operation of state law, however, this Court considered Simmons's ineligibility for parole to have been conceded. *See, e.g., Simmons*, 512 U.S. at 166 (plurality opinion) ("Respondent admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate.")

The fact that a Virginia trial court had not yet performed the ministerial act of entering judgment on Ramdass's third "strike" is of no more consequence than the fact that the South Carolina parole board had not yet formally determined whether Simmons's prior convictions were for unrelated offenses. The only obstacle to either of these predictable formalities was the sort of

"hypothetical future development" that this Court dismissed out of hand in *Simmons*. Everyone knew that the trial judge would enter the judgment and make Ramdass ineligible for parole, just as everyone knew that the South Carolina parole board would declare that Simmons's prior crimes were unrelated and make him ineligible for parole.

The Court's interchangeable use of terms such as "parole ineligibility," "imprisonment without possibility of parole," and "never would be released on parole" underscores the pragmatic nature of this Court's *Simmons* analysis. Just as Simmons had a due process right to inform the jury even though he was technically still eligible for parole on the date of his capital sentencing trial, so did Ramdass.

Even if the South Carolina parole board had formally declared that Simmons was ineligible for parole before the capital sentencing, however, Ramdass would be entitled to relief because there was (and is) no possibility that he could ever be released on parole before his natural death. This Court's due process concern, expressed in both the plurality opinion and Justice O'Connor's concurring opinion, was that jurors should be permitted to make a realistic assessment of the threat to society that the defendant would pose in the future if he was sentenced to life imprisonment. The threat that Ramdass posed to society depended on whether, as a pragmatic matter, there was any possibility that he could be released on parole in the future; it did not depend on whether he was *technically* eligible or ineligible for parole on the single day of his capital sentencing trial.

ARGUMENT

The ultimate issue before the Virginia Supreme Court on remand was whether, in light of *Simmons v. South Carolina*, 512 U.S. 154 (1994), Ramdass's rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution were infringed when the trial court refused to inform the jury that the only available alternative to a sentence of death was life imprisonment without the possibility of parole. The federal question (whether there was a violation of the Fourteenth Amendment) thus rested on top of the state-law question (whether, under state law, Ramdass would ever have the opportunity to be released on parole). This case therefore involves a simple problem that the Court has encountered and resolved many times before: Where a federal right overlays state law, does the federal question turn on the state's technical *characterization* of its own law, or does it depend on the operational *consequences* of state law?

Preliminarily, it is noteworthy that the Virginia Supreme Court begged the federal question presented. Its adjudication was limited to an examination of state law and a determination that on the date of the capital sentencing trial, Ramdass's formal status under that law was not one of "parole *ineligibility*," *Ramdass v. Commonwealth*, 450 S.E.2d at 361 (Va. 1994) (J.A. 130) (emphasis in original), because he did not yet have three qualifying convictions. In restricting its analysis to the technical meaning of the word "conviction" under state law and deeming the answer to the state-law question to be dispositive of any federal question, the Virginia Supreme Court committed the same analytical error this Court described in

Bakery and Pastry Drivers and Helpers Local 802 v. Wohl, 315 U.S. 769 (1942).

In *Bakery and Pastry Drivers*, the state courts had enjoined a union from engaging in informational picketing on the ground that this was a federally protected activity only if its purpose was "the dissemination of information concerning the facts of a labor dispute," *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940), and there was no "labor dispute" as that term was defined by New York law. This Court reversed, succinctly describing the state court's conceptual error:

> So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course that does not follow: one need not be in a "labor dispute" as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter.

Bakery and Pastry Drivers, 315 U.S. at 774.

Simmons similarly establishes that a capital defendant need not already be technically ineligible for parole on the date of his capital sentencing trial in order to have a right under the Fourteenth Amendment to inform the jurors that, in its actual operation, state law forecloses any possibility of his release on parole. *See* Section B *infra*. By looking only at the definition of the word "conviction" under state law, the Virginia Supreme Court disregarded

this federal right and undid indirectly what it was prohibited from undoing directly.

A. The Lower Courts Engaged in the Wrong Analysis

1. Questions Concerning the Nature or Duration of Restraints on Liberty Require a Functional, Rather Than a Technical, Mode of Analysis

There can be no disagreement as to the practical and foreseeable reality of Ramdass's situation: The trial judge in the Domino's Pizza case was going to enter judgment 19 days after the capital sentencing trial, and from that day forth until the day he died, Ramdass would have no possibility of release on parole.[6] No state or federal court judge has questioned that immutable fact. Nonetheless, because a ministerial requirement of state law had not yet been satisfied, the Virginia Supreme Court employed, and the Fourth Circuit majority ratified, a reading of *Simmons* that disregarded the functional reality of parole ineligibility.

Simmons falls within a line of cases from this Court that address the need to define category boundaries when

---

[6] Because Ramdass already had been sentenced to 76 years in prison for the Pizza Hut robberies, he had no possibility of being released on parole during the 19 days before entry of the Domino's Pizza verdict. *See* Virginia Code § 53.1-151(A) (defendant cannot be considered for release on parole until he has served, at a minimum, the lesser of twelve years in prison or one quarter of his sentence). Thus, from the date of the capital sentencing trial forward, there was not a single day on which Ramdass could have been considered for release on parole.

a rule of federal constitutional or statutory law refers to a condition or status that is both a practical fact and a legal term of art. In closely analogous areas of the law that involve constitutional questions concerning the nature or duration of restraints on individual liberty, this Court has resolved the problem by rejecting solutions that "place[ ] form over substance, and labels over reality." *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987).

For example, in applying the requirement under *Miranda v. Arizona*, 384 U.S. 436 (1966), that warnings must precede police interrogation when a person is "in custody," this Court has rejected a technical definition of "custody" derived purely from the legal rules governing police powers of arrest and detention, and employed instead a *functional* analysis of whether the circumstances reasonably would lead the person being interrogated to believe that he or she is not free to leave the station house at will. *See, e.g., Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam) ("In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation"); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) (officer's obligation to administer *Miranda* warnings attaches "only where there has been such a restriction on a person's freedom as to render him 'in custody' ").

In determining whether an individual is "in custody" for purposes of federal habeas corpus jurisdiction, the Court likewise has consistently applied a functional rather than a technical test. In *Jones v. Cunningham*, 371 U.S. 236 (1963), for example, the Court held that a state prisoner who has been released on parole is nonetheless

functionally "in custody" because he or she is still subject to various conditions and restrictions.

> [The Great Writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the "custody" of the members of the Virginia Parole Board within the meaning of the habeas corpus statute.

Id. at 243. And in *Carafas v. LaVallee*, 391 U.S. 234 (1968), the Court held that a state prisoner's pending habeas petition was not *functionally* moot for want of custody, even though his sentence had since expired and he had been discharged from parole.

Under state law, as it actually operated, Ramdass was forever precluded from release on parole. *See* Subsection A.3 *infra*. That is what his sentencing jury wanted to know, and that is what *Simmons* entitled him to have the jury know. The Virginia Supreme Court's and the Fourth Circuit's avoidance of the rule of *Simmons* under these circumstances leaves an important federal due process right subject to the vagaries of highly technical, sometimes arcane, and certainly manipulable state-court characterizations of state law, even when there is no possibility that the defendant can ever be considered for parole. The rulings of these lower courts are at odds with this Court's disposition of similar constitutional questions, and the decision below should be reversed.

2. Federal Questions Require a Mode of Analysis That Looks to the Operating Consequences of Relevant State Law, Rather Than to the State's Characterization of That Law

In focusing on a technical assessment of parole eligibility, the Virginia Supreme Court improperly limited its analysis to (i) characterizing Ramdass's status as a matter of state law and (ii) treating the applicability of the federal constitutional rule of *Simmons* as controlled by that characterization. *See Bakery and Pastry Drivers, supra*. The Fourth Circuit failed to correct this error, deeming the state's characterization of its own law to be dispositive of the federal question. Such an analytical approach is contrary to this Court's well-established precedents. For more than a century, the Court has held consistently and in a wide variety of contexts – civil, criminal, and collateral – that when federal law overlays state law, the proper resolution of federal questions depends on the operational consequences of state-law rules, not on the characterization that a state court or legislature puts on those rules.

In *Bailey v. Alabama*, 219 U.S. 219 (1911), for example, the Court considered whether the Thirteenth Amendment was violated by a state statute that (i) made it a criminal offense for a laborer to enter into an employment contract with intent to injure or defraud and then, after obtaining a salary advance from the employer, to refuse to perform the promised service or return the advance; and (ii) made refusal or failure to perform the service or refund the money *prima facie* evidence of the requisite intent to injure or defraud. Although the state characterized the statute as one that merely punished fraud, this Court concluded

that, for purposes of the federal question presented, the consequence of the statute was to employ the threat of criminal prosecution as a means of compelling involuntary servitude for mere breach of contract. *Id.* at 238.

> We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt; and judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured.

Id. at 238. Because the statute, in actual operation, compelled the employee to perform the contracted-for service on pain of imprisonment, it violated the Thirteenth Amendment. *Id.* at 293-94.

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court considered whether the Due Process Clause was infringed by a Maine statute that required a defendant charged with murder to prove he acted without malice in order to reduce the homicide to manslaughter. Affirming Wilbur's murder conviction, the Maine Supreme Judicial Court held that murder and manslaughter were not distinct crimes but were different degrees of the single generic offense of felonious homicide, that malice was presumed if the killing was intentional, and that the severity of the sentence could be reduced if – but only if – the defendant proved an absence of malice. *Id.* at 687-88. In habeas corpus proceedings, the lower federal courts concluded that murder and manslaughter were distinct

offenses and that, under *In re Winship*, 397 U.S. 358 (1970), the Due Process Clause required the prosecution to prove malice in order to obtain a conviction for the greater offense. This Court preliminarily rejected the lower federal courts' analytical approach, reminding them that they were bound by the state court's definition of the offense. For purposes of the federal question, however, the Court explained that the state court's single-offense characterization was not dispositive:

> *Winship* is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the "operation and effect of the law as applied and enforced by the State," *St. Louis S.W.R. Co. v. Arkansas*, 235 U.S. 350, 362 (1914).

Wilbur, 421 U.S. at 699. The Court then held that because state law, in its actual operation, made malice an essential element of the single offense, *Winship* required the state to carry the burden of persuasion on that element. *Id.* at 703-04.

In *Hicks v. Feiock*, 485 U.S. 624 (1988), the Court considered whether the Due Process Clause was infringed when, in contempt proceedings for repeated failure to make child-support payments, the defendant had the burden of proving that he was financially unable to make the payments. Failing this burden, the defendant was sentenced to five days in jail for each count and ordered to repay his accumulated arrearages. The state court concluded that the proceedings were quasi-criminal in nature, that ability to pay was an element of the charge of contempt rather than an affirmative defense, and that California law unconstitutionally shifted the burden of

persuasion to the contemnor. This Court acknowledged that it was not at liberty to depart from the state court's determination that ability to pay is an element of the offense. *Id.* at 629-30. For purposes of the federal question, however, the critical determination was whether the contempt proceedings were criminal in nature, in which case the burden-shifting violated federal due process, or civil in nature, in which case the burden-shifting was permissible.

> [T]he argument is not merely that the state court misapplied state law, but that the characterization of this proceeding and the relief given as civil or criminal in nature, for purposes of determining the proper applicability of federal constitutional protections, raises a question of federal law rather than state law. . . . The fact that this proceeding and the resultant relief were judged to be criminal in nature as a matter of state law is thus not determinative of this issue, and the state appellate court erred insofar as it sustained respondent's challenge to the statute under the Due Process Clause simply because it concluded that this contempt proceeding is "quasi-criminal" as a matter of California law.

Id. at 630. Looking at the actual operation of state law, the Court concluded that for purposes of the federal question, the correct classification of the contempt proceedings turned on whether the contemnor would purge his sentence by paying the arrearage, and it remanded for a determination of that issue. *Id.* at 640-41.

In *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952), the Court considered whether the

Commerce Clause was infringed by a privilege tax that Mississippi imposed on individuals soliciting orders for out-of-state laundries. The Mississippi Supreme Court had held that under state law, Memphis Steam Laundry's truck drivers were "transient vendors or dealers" subject to the tax. It then characterized the levy as "a tax on a person soliciting business for a laundry not licensed in this state, a local activity which applies to residents and nonresidents alike." *Id.* at 391. Based on this characterization, it concluded that the application of the tax to Memphis's drivers did not offend the Commerce Clause. *Id.* For purposes of deciding the federal question, however, this Court looked to the consequences of the tax, not the state court's characterization of it. "The State may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not 'a tax on interstate commerce.' " *Id.* at 392. Concluding that the *effect* of the levy was to tax the privilege of doing interstate business, the Court held that it violated the Commerce Clause. *Id.* at 393-94.

In *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359 (1954), another tax case, the Court considered whether a tax that was measured by gross receipts violated the Commerce Clause when applied to a company whose business was wholly in interstate commerce. The Virginia Supreme Court characterized this levy as an intangible property tax imposed on the difference between the "bare-bones" value of the business's tangible property in Virginia and the going-concern value of that same property. Based on this characterization, it held that the tax did not violate the federal Constitution. *Id.* at 363. This

Court reversed, explaining that the state court's characterization of the tax was not dispositive of the federal question:

> While great respect is due these conclusions, it has long been held that . . . "neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect," *Galveston, H. & S.A.R. Co. v. State of Texas*, 210 U.S. 217, 227 (1908), in which inquiry "we are concerned only with its practical operation." *Lawrence v. State Tax Com.*, 286 U.S. 276 (1932).

Railway Express, 347 U.S. at 363. Looking at "the practical effect of the tax," the Court held that its "impact is squarely upon gross receipts without consideration of their effect on the value of . . . [the] property," and as such constituted an impermissible state tax upon interstate commerce. *Id.* at 364-66.

In *Henderson v. Mayor of New York*, 92 U.S. (2 Otto) 259 (1875), the Court considered whether the Commerce Clause was infringed by a New York statute that required the owner of every ship to give a $300 bond, with a covenant for four years, for each new immigrant who disembarked in New York, but allowed the bond requirement to be commuted if the owner paid $1.50 for each immigrant within 24 hours of arrival. The New York Court of Errors agreed with the state legislature that the bond was an indemnification against each new immigrant's need for public support for the four years after his arrival. It therefore held that the bond did not unduly burden foreign commerce. This Court explained that the

state court's characterization was not dispositive of the federal question:

> In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the Port of New York, it is . . . a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city.

Id. at 268. Looking at the consequence of the statute, the Court first found it inevitable that the owner of a ship would not give a sizable bond for each of the thousands of passengers he transported to New York each year, but instead would pay $1.50 per head and would collect that amount from each passenger before embarkation. *Id.* Notwithstanding the state's characterization of its own law, the Court then concluded that the function of the statute was not to protect against the future consequences of pauperism, because the bond was as much required for wealthy and hard-working immigrants as it was for diseased persons or paupers who might quickly become objects of charity. *Id.* at 268-69. Because the state bond, in operation, charged foreign passengers for the right to make the voyage, it violated federal law. *Id.* at 274-75.

In *Collins v. New Hampshire*, 171 U.S. 30 (1898), the Court considered whether the Commerce Clause was infringed by a New Hampshire statute that prohibited the sale of oleomargarine as a substitute for butter unless it was colored pink. This Court had previously held in

Schollenberger v. Pennsylvania, 171 U.S. 1 (1898), that a state statute altogether prohibiting the introduction of oleomargarine violated the Commerce Clause. Upholding Collins's criminal conviction for selling oleomargarine that was not the proper color, the New Hampshire Supreme Court characterized its statute as one that merely prescribed the addition of a harmless coloring agent. The state court explained that the statute did not unduly burden interstate commerce because the manufacturer could sell his product freely and at any price. This Court disagreed:

> The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.

Collins, 171 U.S. at 33-34. For purposes of the Commerce Clause question, the Court found that the consequence of the coloration requirement was to make the oleomargarine repugnant to customers to the point where they would not purchase it at any price. *Id.* Because this condition, if complied with, would effectually prevent any sale, the statute, in actual operation, suffered from the same federal constitutional vice as the statute in *Schollenberger*.

3. However the Virginia Supreme Court May Characterize the Circumstances That Result in Parole "Ineligibility" Under State Law, Ramdass Was Certain Never To Have an Opportunity To Be Paroled and Was Entitled To So Inform the Jury Under *Simmons*

As the foregoing cases confirm, Virginia can define the incidence of its parole laws however it wishes, and Ramdass will have no federal basis for complaint. But the cases are equally plain that the federal constitutional rule of *Simmons* is not regulated by the Virginia Supreme Court's characterization of state law. Even if parole "ineligibility" in Virginia requires three "convictions" in the sense of convictions-reduced-to-judgment (as the Virginia Supreme Court said in rejecting Ramdass's *Simmons* claim), those state-law labels are not dispositive of the federal constitutional question of what *Simmons* commands. The Fourth Circuit's abdication to state-law characterization as controlling the scope of *Simmons* was simply wrong.

The scope of *Simmons* depends on the actual operation of state law, not on the terms in which a state court may choose to describe its workings. In the instant case, state law *in actual operation* foreclosed any possibility that Ramdass could be released on parole before his natural death. Ramdass incontestably had two of the three "strikes" required by state law; and the entry of judgment for the Domino's Pizza armed robbery – which would constitute the third qualifying conviction and therefore the third "strike" – was foreseeable, imminent, and inexorable. The Domino's Pizza jury had found Ramdass guilty of that armed robbery. Ramdass had twice moved

to strike the evidence on the ground that it was insufficient to sustain that verdict; the trial court had denied the motion both times; and state law did not allow Ramdass to renew the motion. *See* Virginia Supreme Court Rule 3A:15(a). To make the jury's verdict into a "conviction" (in the terminology of the Virginia Supreme Court), there was nothing more for the court to do but perform the ministerial act of entering judgment.

To be sure, there was still a purely hypothetical possibility that the Domino's Pizza trial judge could set aside the verdict under Virginia Supreme Court Rule 3A:15(b) on the ground that the evidence was insufficient or that error was committed at trial.[7] The window of opportunity for a defendant to move under Rule 3A:15(b) remains open until 21 days after entry of judgment. But there was an identical possibility that the Pizza Hut trial judge could set aside the jury's verdict in *that* case under Rule 3A:15(b). That is so because the judgment in the Pizza Hut trial had been entered on January 22, 1993, one week before the capital sentencing trial. *Ramdass v. Angelone*, 450 S.E.2d at 361 (J.A. 130). That meant that the 21-day window for the Pizza Hut offense did not close until

---

[7] No one has ever suggested that there was any basis in law or in fact for the trial court to set aside the Domino's Pizza verdict under Rule 3A:15(b) (App. 5). Indeed, given that the prosecution's cross-examination of Ramdass at the capital sentencing trial had elicited his judicial confession to the Domino's Pizza robbery (J.A. 57-59), it was inconceivable that Ramdass would somehow escape judgment and sentence for that robbery.

February 12, 1993, which was fourteen days *after* Ramdass's capital sentencing trial. If the hypothetical possibility of a setting-aside of the verdict under Rule 3A:15(b) was insufficient to affect the status of the Pizza Hut offense as a "strike" – as the Virginia Supreme Court's opinion on remand recognized – then it could not affect the status of the Domino's Pizza offense as a "strike" either.

And the Virginia Supreme Court's dismissal of the hypothetical possibility of future challenges under Rule 3A:15(b) is consistent with this Court's dismissal of the same kind of hypothetical possibilities in *Simmons*: "To the extent that the State opposes even a simple parole-ineligibility instruction because of hypothetical future developments, the argument has little force." *Simmons*, 512 U.S. at 166 (plurality opinion). Short of just such "hypothetical future developments," state law foreclosed any chance that Ramdass could ever be released.[8]

[8] In its pleadings below and in its opposition to certiorari, Virginia has persistently conflated Ramdass's contention that his case is governed by *Simmons* because state law makes it impossible for him ever to be *considered for parole*, with a claim that *Simmons* requires an instruction about a defendant's unlikely *prospects for parole* in the sense of the unlikelihood that a parole board would deem him *suitable for a grant* of parole. This is a red herring. Ramdass has never argued that courts should consider parole suitability in deciding whether a defendant is entitled to an instruction under *Simmons*.

B. The *Simmons* Court Itself Looked at the Consequences of State Law Rather than the State's Characterization, and the Facts Demonstrating This Also Show That Ramdass's Case Is Indistinguishable from Simmons's Case on Both the Facts and the Law

The validity of Ramdass's claim under *Simmons* is proved by this Court's analysis in *Simmons* itself. Both the plurality and concurring opinions in *Simmons* were based on the practical and foreseeable operation of South Carolina law rather than on a technical determination of parole eligibility under state law on a particular isolated date. Confronted with an argument from South Carolina that Simmons was not technically ineligible for parole and that he could, in any event, be released by some other means, the *Simmons* plurality dismissed the state's argument as having "little force." *Simmons*, 512 U.S. at 166.

The Virginia Supreme Court and the Fourth Circuit appear to have assumed that Jonathan Dale Simmons was technically ineligible for parole and that this factual distinction took Ramdass's case out of the core rule of *Simmons*. In truth, however, Simmons had never been declared ineligible for parole (as was technically required for ineligibility under South Carolina law), and he was "ineligible" for parole at the time of his capital sentencing trial only in a pragmatic sense. Thus, the facts that demonstrate this Court's analytical approach in *Simmons* also demonstrate that Ramdass's case is indistinguishable.

1. The *Simmons* Facts and This Court's Analysis

At the time of Simmons's trial, firmly established South Carolina law vested parole eligibility decisions solely in the Probation, Parole and Pardon Board. *State v. McKay*, 386 S.E.2d 623 (S.C. 1991). Based on this authority, South Carolina's brief in this Court represented that:

> First and foremost, at the time of the trial, no state agency had ever determined that Simmons was going to be serving a sentence of life without the possibility of parole, despite the fact that he had earlier pled guilty and been sentenced to a violent crime prior to this trial. The importance of that distinction is that the power to make that determination did not rest with the judiciary, but was solely vested in an executive branch agency, the South Carolina Board of Probation, Parole and Pardon Services. *State v. McKay*, 300 S.C. 113, 386 S.E.2d 623 (1991) (proper for the trial court to refuse to determine whether earlier violent offense conviction was part of one continuous course of conduct). *Accord Williams v. Commonwealth, supra*; [*State v.*] *Torrence*, [406 S.E.2d 315], 323 [(S.C. 1991)] ("there is no way [for the court] to be assured that the Parole Board would reach the same conclusion as the court [on questions of parole ineligibility]").

Respondent's Brief in *Simmons v. South Carolina*, No. 92-9059, at 95-96; 1993 WL 669003 at *95-96 (filed Dec. 14, 1993) (brackets in parenthetical in original). In other words, Simmons was not ineligible for parole under state law *until the parole board said so*, and at the time of his trial there was a theoretical possibility that the board might

say otherwise.[9] Although the General Counsel to the Department of Corrections made a proffer *in camera* that if Simmons was convicted of murder, he would serve a sentence of life without parole, this testimony was qualified by the caveat that Simmons would be ineligible for parole "*assuming* that was . . . [a] second conviction not related to the first violent offense. . . . " Joint Appendix in *Simmons v. South Carolina*, No. 92-9059, at 13; 1993 WL 669003 at *13a (emphasis added).

In his reply brief, counsel for Simmons acknowledged that Simmons had not yet been found ineligible for parole but said that "[t]his assertion, though technically true, is irrelevant." Petitioner's Reply Brief in *Simmons v.*

---

[9] Simmons was convicted of murder for beating an elderly woman to death. One week before the start of the murder trial, Simmons pleaded guilty to two other assaults on elderly women. Simmons assumed that those assaults constituted his first "strike," and the murder conviction counted as his second "strike" – a circumstance that would have rendered him ineligible for parole under South Carolina law. But it was at least theoretically possible that, when it passed on his case some weeks or months afer the capital sentencing trial, the parole board would rule that the murder and the other two assaults, though separated by 14 months, were sufficiently related to each other to be regarded as part of a "continuous course of conduct." Such a ruling would have left Simmons eligible for parole, because a subsequent conviction would not count as a second "strike" if it occurred either within 24 hours of the previous offense *or* if it was part of a continuous course of conduct. *See* S.C. Code § 24-21-640 (1993 Supp.). At the time of Simmons's sentencing, no South Carolina case had construed this statutory provision, and as *State v. McKay* had already made clear, South Carolina sentencing courts lacked authority to make such parole eligibility determinations in the first instance.

South Carolina, No. 92-9059, at 1; 1993 WL 625970 at *1 (filed Dec. 27, 1993). Simmons's counsel contended that it was irrelevant because, when Simmons eventually was classified by the parole board, he was sure to meet the statutory criteria for ineligibility under S.C. Code § 24-21-640. Thus, a future declaration to this effect by the parole board would be a mere formality.

The Court was fully cognizant that Simmons was ineligible for parole only as a pragmatic fact, though not yet as a matter of law. "[Simmons] proffered, outside the presence of the jury, evidence conclusively establishing his parole ineligibility. On petitioner's behalf, attorneys for the South Carolina Department of Corrections . . . testified that any offender in petitioner's position was *in fact* ineligible for parole under South Carolina law." *Simmons*, 512 U.S. at 158 (plurality opinion) (emphasis added). Passing over South Carolina's argument that Simmons was not *technically* eligible for parole as a matter of law, this Court considered Simmons's ineligibility for parole to have been effectively conceded. "Respondent admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate." *Id.* at 166 (plurality opinion); *see also id.* at 176 (O'Connor, J., concurring) ("the only available alternative sentence to death in petitioner's case was life imprisonment without possibility of parole"). The Court obviously could not have described any of South Carolina's statements as an *admission* of parole ineligibility unless it was looking at the actual and foreseeable operation of state law rather

than employing a technical state-law definition of "ineligible."[10]

South Carolina also offered other, equally strained "possibility of release" arguments, pointing to statutory provisions for commutation and clemency that might have resulted in Simmons's eventual release into society; and it argued that such possibilities made a parole ineligibility instruction "inherently misleading."[11] *Id.* at 166 (plurality opinion). The Court found all of this argumentation of "little force." *Id.*

2. Ramdass's Case Is Functionally Equivalent to Simmons's Case

The fact that a Virginia court had not yet performed the ministerial act of entering judgment on Ramdass's conviction for the Domino's Pizza robbery is of no more consequence than the fact that the South Carolina Parole Board had not yet formally determined whether one or

---

[10] At oral argument, counsel for South Carolina said nothing to contradict the position, advanced in his brief, that Simmons was not technically ineligible for parole until the parole board made the required finding. Transcript of Oral Argument in *Simmons v. South Carolina*, No. 92-9059, at 23-50; 1994 WL 663636 at *23-50 (Jan. 18, 1994).

[11] South Carolina's "possibility of release" arguments did not include the prospect that Simmons might move for a new trial on one of the offenses that counted as a "strike" toward parole ineligibility, but it easily could have done so. Indeed, South Carolina, unlike Virginia, allows defendants to move for a new trial at any time based on newly discovered evidence, so long as the motion is made within a reasonable time after discovery of that evidence. *See* S.C.R. Crim. P. 29(b).

both of Simmons's prior convictions were for separate, unrelated offenses under South Carolina parole law. The only obstacles to either of these predictable formalities were the sort of "hypothetical future developments" that this Court dismissed out of hand.

The eventual outcome – which, of course, has now come to pass – was at least as much a foregone conclusion in Ramdass's case as it was in Simmons's case. Everyone except Ramdass's capital sentencing jury knew that the trial judge presiding over the Domino's Pizza matter was going to make Ramdass ineligible for parole by performing the ministerial act of entering judgment, *see* Subsection A.3, *supra*, just as everyone believed that the South Carolina parole board was going to make Simmons ineligible for parole by finding that the murder and prior assaults were unrelated and therefore counted as separate "strikes." No court throughout the present proceedings has quarreled with this unavoidable conclusion. The actual and foreseeable operation of state law was bound to render Ramdass, like Simmons, ineligible for parole.

The fact that Jonathan Dale Simmons was technically eligible for parole but functionally ineligible for actual release from prison by parole underscores the pragmatic nature of this Court's *Simmons* analysis. It is consistent with the repeated, interchangeable references throughout the *Simmons* opinions to "parole ineligibility," *see Simmons*, 512 U.S. at 169 (plurality opinion) ("Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention"); "imprisonment without possibility of parole," *id.* at 177 (O'Connor,

J., concurring) ("I agree that due process requires that the defendant be allowed to . . . [inform the jury] in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future"); and the fact that Simmons "never would be released on parole," *see id.* at 165 (plurality opinion), or "never would be released from prison," *id.* at 178 (O'Connor, J., concurring). In short, the Court's square holding in *Simmons* was that Simmons had a due process right to inform the jury truthfully that he could never be released from prison on parole, even though he was technically still eligible for parole consideration under state law on the date of his capital sentencing trial. Ramdass had the same due process right regardless of the fact that he was technically eligible for parole until the foreordained moment when the Domino's Pizza judge performed the ministerial act of entering judgment.

3. The Rule in *Simmons* Would Apply to Ramdass Even If Jonathan Simmons Had Been Technically Ineligible for Parole

Ramdass's entitlement to relief does not rest solely on the fact that, for all material purposes, his case is a clone of Simmons's case. Even if Jonathan Dale Simmons had been declared legally and technically ineligible for parole before the date of his capital sentencing trial, as the Virginia Supreme Court assumed, Ramdass would come fully within the core rule in *Simmons*.

The holding in *Simmons*, expressed in the plurality opinion, is as follows:

> We hold that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.

Simmons, 512 U.S. at 156. Notably, the words "parole ineligib[ility]" appear here only in the description of the phrase to be given to the jury. They are not used in this Court's description of the condition precedent – a finding that "state law prohibits the defendant's release on parole." In Ramdass's case, Virginia law, in its actual and foreseeable operation, "prohibit[ed] the defendant's release on parole." From the date of his capital sentencing trial until the date of his death, there would never be a point where state law permitted him to be released on parole. That circumstance entitled Ramdass to inform the jury, in the language of the final clause of the *Simmons* holding, that he was "parole ineligible." Parole ineligibility in this context flowed from the fact that state law prohibited the defendant's release on parole, not from a technical and formalistic determination of parole eligibility under state law.

The careful wording of the *Simmons* holding is consistent with the Court's due process concern, expressed in both the plurality and concurring opinions, that jurors be permitted to make an informed and realistic assessment of the threat to society that is posed by a sentence of life imprisonment. *Id.* at 171 (plurality opinion) ("The State may not create a false dilemma by advancing generalized

arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole"); *id.* at 177 (O'Connor, J., concurring) ("I agree that due process requires that the defendant be allowed to [inform the jury] in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future"). The threat that Ramdass posed to society had everything to do with whether, as a pragmatic matter, there was any possibility that he could be released on parole in the future; it had nothing to do with whether he was *technically* eligible or ineligible for parole on the single day of his capital sentencing trial.

* * *

If there is any difference between *Simmons* and this case, it is that what happened here was even more egregiously unfair. Whether the prosecution actually alleged Jonathan Simmons's future dangerousness as a reason to sentence him to death was open to dispute. *See Simmons*, 512 U.S. at 180-81 (Scalia, J., dissenting). In this case, however, the prosecution's claim that Ramdass posed a risk of further criminal violence was the sole legal basis of its request for the death penalty. And while the subject of parole was never mentioned in open court at Simmons's trial until the jury asked about it, Ramdass's prosecutor saw to it that the jury learned all about the defendant's prior releases on parole, and the fact that Ramdass was on parole when he committed the capital murder for which he was being sentenced. Under state

law, the actual possibility that either Simmons or Ramdass would have the opportunity to be considered for parole in the future was equally non-existent. But the evidence in this case placed both the issue of future dangerousness and the illusion of future parole release even more squarely before the sentencing jury than had the evidence in *Simmons*. Under these circumstances, the Virginia Supreme Court's refusal to vacate Ramdass's death sentence was manifestly "contrary to" *Simmons*, *see* 28 U.S.C. § 2254(d)(1), and constitutionally indefensible.

CONCLUSION

The judgment of the Fourth Circuit below endorses a decision of the Virginia Supreme Court that is flatly inconsistent with *Simmons* and with this Court's repeated teachings that the power of state courts to announce rules of state law does *not* include the power to dictate the federal constitutional consequences of the state-law rules they announce. The judgment should therefore be reversed, and this case should be remanded with

directions to reinstate the judgment of the district court granting relief on Mr. Ramdass's *Simmons* claim.

Respectfully submitted,

Of Counsel:

DAVID I. BRUCK
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

F. NASH BILISOLY
Counsel of Record
JOHN M. RYAN
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, VA 23510
(757) 446-8600

MICHELE J. BRACE
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
1001 East Main Street
Richmond, VA 23219
(804) 643-6845

Counsel for Petitioner

CODE OF VIRGINIA
TITLE 53.1. PRISONS AND OTHER METHODS OF CORRECTION.
CHAPTER 4. PROBATION AND PAROLE.
ARTICLE 3. PROCEDURES GOVERNING PAROLE.

§ 53.1-151 Eligibililty for parole.[1]

A. Except as herein otherwise provided, every person convicted of a felony and sentenced and committed by a court under the laws of this Commonwealth to the Department of Corrections, whether or not such person is physically received at a Department of Corrections facility, or as provided for in § 19.2-308.1:

1. For the first time, shall be eligible for parole after serving one-fourth of the term of imprisonment imposed, or after serving twelve years of the term of imprisonment imposed if one-fourth of the term of imprisonment imposed is more than twelve years;

2. For the second time, shall be eligible for parole after serving one-third of the term of imprisonment imposed, or after serving thirteen years of the term of imprisonment imposed if one-third of the term of imprisonment imposed is more than thirteen years;

3. For the third time, shall be eligible for parole after serving one-half of the term of imprisonment imposed, or after serving fourteen years of the term of imprisonment imposed if one-half of the term of imprisonment imposed is more than fourteen years;

---

[1] The version of Virginia Code § 53.1-151 reproduced here is the one that was in effect at the time of Ramdass's trial.

4. For the fourth or subsequent time, shall be eligible for parole after serving three-fourths of the term of imprisonment imposed, or after serving fifteen years of the term of imprisonment imposed if three-fourths of the term of imprisonment imposed is more than fifteen years.

For the purposes of subdivisions 2, 3 and 4 of subsection A and for the purposes of subsections B1 and B2, prior commitments shall include commitments to a correctional facility under the laws of any state or of the United States for murder, rape, robbery by the presenting of firearms or other deadly weapon, or manufacturing, selling, giving, distributing or possessing with the intent to manufacture, sell, give or distribute a controlled substance, if such would be a felony if committed in the Commonwealth, provided the current sentencing order contains a finding of such prior commitments. Only prior commitments interrupted by a person's being at liberty, or resulting from the commission of a felony while in a correctional facility of the Commonwealth, of any other state or of the United States, shall be included in determining the number of times such person has been convicted, sentenced and committed for the purposes of subdivisions 2, 3 and 4 of subsection A. "At liberty" as used herein shall include not only freedom without any legal restraints, but shall also include release pending trial, sentencing or appeal, or release on probation or parole or escape. In the case of terms of imprisonment to be served consecutively, the total time imposed shall constitute the term of the imprisonment; in the case of terms of imprisonment to be served concurrently, the longest term imposed shall be the term of imprisonment. In any case in which a parolee commits an offense while

on parole, only the sentence imposed for such offense and not the sentence or sentences or any part thereof from which he was paroled shall constitute the term of imprisonment.

B. Persons sentenced to die shall not be eligible for parole. Any person sentenced to life imprisonment who escapes from a correctional facility or from any person in charge of his custody shall not be eligible for parole.

B1. Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

B2. Any person convicted of three separate felony offenses of manufacturing, selling, giving, distributing or possessing with the intent to manufacture, sell, give or distribute a controlled substance, when such offenses were not part of a common act, transaction or scheme, and who has been at liberty as defined in this section between each conviction, shall not be eligible for parole.

C. Any person sentenced to life imprisonment for the first time shall be eligible for parole after serving fifteen years, except that if such sentence was for a Class 1 felony violation or the first degree murder of a child under the age of eight in violation of § 18.2-32, he shall be eligible for parole after serving twenty-five years, unless he is ineligible for parole pursuant to subsection B1 or B2.

D. A person who has been sentenced to two or more life sentences, except a person to whom the provisions of subsection B1, B2, or E of this section are applicable, shall be eligible for parole after serving twenty years of imprisonment, except that if either such sentence, or both, was or were for a Class 1 felony violation, and he is not otherwise ineligible for parole pursuant to subsection B1, B2, or E of this section, he shall be eligible for parole only after serving thirty years.

E. A person convicted of an offense and sentenced to life imprisonment after being paroled from a previous life sentence shall not be eligible for parole.

F. If the sentence of a person convicted of a felony and sentenced to the Department is partially suspended, he shall be eligible for parole based on the portion of such sentence execution of which was not suspended.

G. The eligibility time for parole as specified in subsections A, C and D of this section may be modified as provided in §§ 53.1-191, 53.1-197 and 53.1-198.

H. The time for eligibility for parole as specified in subsection D of this section shall apply only to those criminal acts committed on or after July 1, 1976.

I. The provisions of subdivisions 2, 3 and 4 of subsection A shall apply only to persons committed to the Department of Corrections on or after July 1, 1979, but such persons' convictions and commitments shall include all felony convictions and commitments without regard to the date of such convictions and commitments.

VIRGINIA RULES ANNOTATED
RULES OF SUPREME COURT OF VIRGINIA
PART THREE A Criminal Practice and Procedure

RULE 3A:15. Motion to Strike or to Set Aside Verdict; Judgment of Acquittal or New Trial.

(a) Motion to Strike Evidence. – After the Commonwealth has rested its case or at the conclusion of all the evidence, the court on motion of the accused may strike the Commonwealth's evidence if the evidence is insufficient as a matter of law to sustain a conviction. If the court overrules a motion to strike the evidence and there is a hung jury, the accused may renew the motion within the time specified in Rule 1:11 and the court may take the action authorized by the Rule.

(b) Motion to Set Aside Verdict. – If the jury returns a verdict of guilty, the court may, on motion of the accused made not later than 21 days after entry of a final order, set aside the verdict for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction.

(c) Judgment of Acquittal or New Trial. – The court shall enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. The court shall grant a new trial if it sets aside the verdict for any other reason.